



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Firm Erich Bernion GmbH
File: B-234680, B-234681
Date: July 3, 1989

DIGEST

1. Protest that contracting officer's nonresponsibility determination lacked a reasonable basis is denied where determination is based upon contracting officer's reasonable conclusion that the protester's prior performance was inadequate.
2. Procuring agency acted reasonably in concluding that protester's corrective action plan did not demonstrate firm's affirmative responsibility where plan was skeletal and prospective in nature and did not demonstrate how firm would correct prior performance problems.
3. Protest that nonresponsibility determination was tantamount to a de facto debarment is denied where protester will not be precluded from competing and receiving award of future contracts, assuming protester is otherwise qualified and convinces agency that its past performance problems have been corrected.

DECISION

Firm Erich Bernion GmbH protests the determination of the Department of the Army that Bernion was nonresponsible under request for proposals (RFP) Nos. DAJA02-89-R-0005 (-0005) and DAJA02-89-R-0012 (-0012) for building renovation and repair services in West Germany. Bernion contends that the Army's determination lacked a reasonable basis, is based on erroneous information and amounted to a de facto debarment.

The protest is denied.

045915/139050

BACKGROUND

The basis of the contracting officer's nonresponsibility determination was Bernion's unsatisfactory performance of contracts on which Bernion, as the prime contractor, exercised insufficient supervision of its subcontractors. The contracting officer in making his nonresponsibility determination reviewed documentation supplied to him by the contract administration branch which detailed Bernion's performance deficiencies. This documentation indicated that on four large contracts which Bernion performed between October 1988, to January 1989, Bernion failed to exercise effective management of its subcontractors which resulted in untimely performance.

Because Bernion was on the Contractor Improvement Program list^{1/}, the contracting officer had also requested a pre-award survey (PAS) for RFP Nos. -0005 and -0012 and for RFP No. -0019.^{2/} The PAS team recommended "no award" to Bernion for any of the RFPs on the basis that Bernion had failed to meet delivery schedules on four of its last six contracts because of its poor management of subcontractors. The PAS team also noted that RFP Nos. -0005 and -0012 would require extensive subcontracting and that award under the three RFPs would result in an "overload of the contractor's capacity to perform."

Prior to the issuance of the PAS report, Bernion was given the opportunity to submit a corrective action plan detailing the actions it had taken in the areas of timely performance, effectiveness of management and subcontractor management. Bernion's corrective action plan was provided to the contracting officer as a part of the PAS, but the PAS team's only comment in the PAS concerning Bernion's corrective action plan was that if the contracting officer found the plan to be adequate he could consider award to Bernion under RFP-0019.

^{1/} The Contractor Improvement Program is a list of contractors with a history of performance problems. Its purpose is to require contracting officers to request a pre-award survey to ensure that deficiencies have been corrected prior to making awards.

^{2/} RFP-0019 sought offers for the installation of cabinets in an elementary school in West Germany. Bernion was ultimately found responsible under this RFP and received award.

The contracting officer determined that Bernion was nonresponsible and ineligible for award under RFP Nos. -0005 and -0012, and awards under the RFPs were made to other firms. Bernion, however, was found responsible under RFP No. -0019, which did not require the use of subcontractors, and awarded a contract.

Bernion protests that the Army's nonresponsibility determination is unreasonable because the agency did not consider Bernion's corrective action plan. Bernion also contends that the contracting officer's determination that Bernion's performance was untimely on four contracts is based upon erroneous information. In addition, Bernion argues that the Army's actions are tantamount to a de facto debarment.

Performance of the contracts awarded under RFP Nos. -0005 and -0012 has been suspended, pending resolution of the protest, in accordance with our Bid Protest Regulations. 4 C.F.R. § 21.4(b) (1988).

FINDINGS OF FACT

We granted Bernion's request for fact-finding under section 21.5(b) of our Bid Protest Regulations, 4 C.F.R. § 21.5(b), because the record was unclear as to what extent, if any, the contracting officer considered Bernion's corrective action plan. Because of health reasons, the contracting officer could not travel to our Office for the conference. However, to resolve the factual issue concerning consideration of Bernion's corrective action plan, the contracting officer's testimony by oral deposition, under oath and subject to cross-examination was taken. The following findings of fact are based on the testimony of the contracting officer.

The contracting officer made his determination of nonresponsibility prior to receiving the PAS and Bernion's corrective action plan. Deposition Transcript (Tr.) at 18, 20, 26, 61 and 80. His determination was based on documents in his possession, which he received from the contract administration branch and which showed that Bernion's recent performance on large contracts requiring subcontractors was unsatisfactory. Tr. at 22. He, however, found that Bernion's performance of contracts, which did not require subcontractors, was satisfactory. Tr. at 45.

The contracting officer received Bernion's corrective action plan with the PAS (Tr. at 86) and went through the corrective action plan in its entirety. Tr. at 66, 86. The PAS and corrective action plan did not cause him to change his

mind that Bernion was nonresponsible. Tr. at 21.3/ He concluded that the plan was well structured. Tr. at 88. However, he also concluded that since names for project supervisors for required subcontracting disciplines were blank, the plan was too prospective in nature to be relied upon. Tr. at 66. Specifically, the contracting officer found that:

"There was really no substance to it. There was nothing you could -- there was no assignment of personnel to specific phases of the operation by name and just exactly how it was going to be accomplished. That was really all, you know, -- there was just not enough substance to the report as far as I was concerned. . . . additionally, I felt that there just wasn't enough among the names that were mentioned, -- enough expertise to go forward satisfactorily in these various functions." Tr. at 68.

The contracting officer, however, testified that he did not think that Bernion lacked the financial capability to hire required personnel. Tr. at 76.

The basis of the contracting officer's nonresponsibility determination was that Bernion's past performance of contracts involving subcontractors was unsatisfactory and that Bernion's corrective action plan did not convince him that Bernion could satisfactorily perform RFP Nos. -0005 and -0012 because performance of these solicitations would require subcontractors. Tr. at 96, 98. The contracting officer determined that Bernion was responsible under RFP No. -0019 because performance of this solicitation would not require any subcontractors. Tr. at 22.

ANALYSIS

The Federal Acquisition Regulation (FAR) provides that contracts shall be awarded only to responsible contractors. FAR § 9.103 (FAC 84-18). In order to be found responsible, a prospective contractor must have a satisfactory performance record. FAR § 9.104-1(c). In particular, a prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be

3/ While the contracting officer testified at one point that he did not reevaluate his nonresponsibility determination after receipt of the PAS, the bulk of his testimony indicated that he in fact considered the PAS and corrective action plan. See Tr. 66 to 68.

nonresponsible unless the contracting officer determines that the circumstances were properly beyond the contractor's control or that the contractor has taken appropriate corrective action. FAR § 9.104-3(c) (FAC 84-39).

We have found that, since the contracting agency must bear the brunt of any difficulties experienced in obtaining the required performance, the agency has broad discretion in making responsibility determinations, based on its business judgment. BMY, Div. of Harsco Corp., B-233081 et al., Jan. 24, 1989, 89-1 CPD ¶ 67. Accordingly, we will not question a nonresponsibility determination unless the protester demonstrates bad faith by the agency or a lack of any reasonable basis for the determination. Id.

Bernion argues that the contracting officer acted unreasonably in discounting Bernion's corrective action plan on the basis that Bernion had not identified the prospective employees that would supervise the performance of subcontractors. Bernion contends that since the contracting officer did not question its ability to hire additional personnel that it was improper to discount its plan on this basis.

The Army responds that based upon the information available the contracting officer could not affirmatively determine that Bernion had the capability to satisfactorily perform contracts requiring the performance of subcontractors. The agency points out that Bernion is a small firm, of approximately 20 employees, which is only licensed to perform carpentry and joinery projects and that Bernion can only perform building renovation services with subcontractors. In this regard, Bernion has only three employees who could serve as construction site supervisors. The corrective action plan, on the other hand, does not list individuals which Bernion will use to supervise subcontractors but provides blank spaces for the insertion of up to 10 names for subcontractor supervisors.

We find that the Army had a reasonable basis in concluding that Bernion had not demonstrated its responsibility. The FAR provides that in the absence of information clearly indicating that a prospective contractor is responsible the contracting officer is required to make a determination of nonresponsibility. FAR § 9.103(b). Here, Bernion's corrective action plan did not show who the firm would be hiring to perform the required supervision of subcontractors, what qualifications these unnamed individuals would possess or when these individuals would be hired. In light of the skeletal and prospective nature of the corrective action plan, the agency had a reasonable basis to conclude

that there was not enough information to affirmatively determine that Bernion could satisfactorily perform RFP Nos. -0005 and -0012. In this regard, we recognize that these determinations are inherently judgmental and that the fact that two people can reasonably reach opposite conclusions regarding a firm's responsibility does not demonstrate that the contracting officer's determination lacked a reasonable basis or was made in bad faith. See Alan Scott Indus., B-225210.2, Feb. 12, 1987, 87-1 CPD ¶ 155.

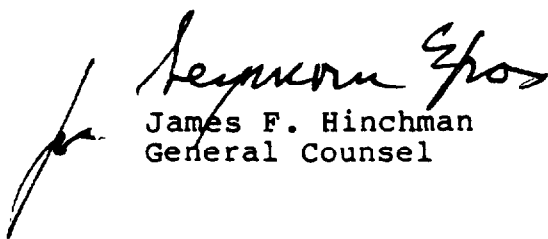
Bernion also argues that the contracting officer based his nonresponsibility determination on erroneous information. Bernion contends that the four contracts, identified in the PAS as being performed untimely, were actually performed by the revised contract completion date. Further, Bernion argues that the contracting officer did not consider information concerning Bernion's successful performance of contracts which would demonstrate Bernion's current capability to perform.

We have found that a nonresponsibility determination may be based upon the procuring agency's reasonable finding of inadequate prior performance, even where the agency did not terminate the prior contract for default or the contractor disputes the agency's interpretation of the facts or has appealed a contracting officer's adverse determination. Firm Erich Bernion GmbH, B-233106, Dec. 28, 1988, 88-2 CPD ¶ 632. Here, the contracting officer was provided with information from the contract administration branch and the PAS team which was sufficient to conclude that Bernion's recent past performance of contracts requiring subcontractors was inadequate. Furthermore, Bernion's argument that it timely performed the four contracts in question is without merit. The record reflects that the contract completion dates for these contracts had to be extended due to Bernion's untimely performance.

Also, the new information, that Bernion contends establishes its current capability to perform, consists of contracts whose contract completion dates predate the four unsatisfactory contracts relied upon by the contracting officer. Therefore, this "new" information does not affect the contracting officer's determination that Bernion's recent performance of contracts, requiring subcontractors, was unsatisfactory.

Finally, Bernion argues that the contracting officer's determination that Bernion was nonresponsible to receive contracts requiring the performance of subcontractors was tantamount to a de facto debarment. A finding of nonresponsibility pertains only to the contract in question and does not bar the firm from competing for future contracts and receiving awards if it is otherwise qualified and convinces the agency that the firm's past performance problems have been corrected. Firm Reis GmbH, B-224544 et al., Jan. 20, 1987, 87-1 CPD ¶ 72. The record here shows that Bernion will not be precluded from competing and receiving award of future contracts, assuming it is otherwise qualified and convinces the agency that its subcontractor supervision deficiencies have been corrected.

The protest is denied.



James F. Hinchman
General Counsel